IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19303 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MINAXIBEN SHASHIKANTBHAI PATEL - Petitioner(s)
Versus
DIST. COLLECTOR - Respondent(s)

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Appearance :
MR BS BRAHMBHATT for Petitioner(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 30/10/2006

ORAL JUDGMENT

1. The only question, which arise for consideration of this Court in the present petition is whether for a Will executed by a Hindu qua the property

situated outside the original civil jurisdiction of the High Court at Calcutta, Madras and Mumbai, the probate is a compulsory requirement for establishing the rights pursuant to the will or not? In the present case, it is an admitted position that property is situated at Gandhinagar and therefore, the incidental question which may be required to be considered by the Court is whether probate for such will is necessary requirement for claiming any right under the said will or not?

2. The short facts of the case are that the petitioner is a housewife and her farther-in-law purchased the property in Gandhinagar(Gujarat State) bearing Plot No. 1319/1 at Sector No. 3B admeasuring about 90 Sq. Mtrs. The Registered Sale Deed is also executed by Ilaben Vivekchandra Desai in favour of the father-in-law of the petitioner Chandubhai Jivabhai Patel on 29.03.1996. The said document came to be registered vide No. 1160 with the Sub-Registrar, Gandhinagar and consequently, the father-in-law of the petitioner became owner of the property in question. It appears that the father-in-law of the petitioner Chandubhai Jivabhai Patel, executed a Will dated 03.04.2000, which also came to be registered with the Sub-Registrar, Gandhinagar vide No. 1619. It is the case of the petitioner that as per the said Will, the property is bequeathed to the petitioner, who is

wife of Shashikantbhai Patel, the youngest son of the executant of the Will. The executant of the Will Chandubhai Jivabhai Patel since expired on 05.07.2000, the petitioner applied to the revenue authority, i.e. the District Collector for entering mutation on her name based on the Will dated 03.04.2000 of the deceased Chandubhai Jivabhai Patel. It is the case of the petitioner that the process was undertaken and during the course of the said process, the other legal heirs of the deceased Chandubhai Jivabhai Patel consented for mutation in favour of the petitioner. However, the District Collector by the impugned communication dated 30.11.2004 declined to consider the matter on the ground that the probate is not obtained of the Will and the matter will be considered after the probate is obtained and therefore, under these circumstances, the petitioner has approached to this Court by way of the present petition.

3. I have heard Mr. Brahmbhatt, learned counsel appearing for the petitioner, Mr. Mengdey, learned AGP for the respondent District Collector.

4. As such, on the aspects of the existence of the Will, there is no dispute. Whether the Will is genuine or not is also not in dispute before this Court. Whether by the present Will, rights of the other legal heirs of the deceased are

affected in any manner or not is also not an aspect, which is the subject matter of this petition. The only aspect, which arise for consideration is legality and validity of the stand taken by the District Collector for insistence of the probate before making mutation entry in the revenue record based the will of the deceased.

5. In my view, as per the provisions of Section 57 of the Indian Succession Act, 1925 (hereinafter referred to as “the Act”), the provisions of testamentary succession are applicable to the Will made by Hindu, subject to restriction and the modifications specified therein. The Will made by Hindu are differently classified qua the property situated within the territories, which were subject to the control of the Lieutenant-Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay. Whereas, qua all other Wills made by Hindus, a separate clause is provided under clause (c) of the Section 57 of the Indian Succession Act.

6. As per Section 213 of the Indian Succession Act, the right as executor or legatee pursuant to the Will can be established in any Court of justice unless a Court of competent jurisdiction has granted probate of the said Will. However, sub-section 2 of Section 213 provides that this

Section shall not apply to the Will made by Hindu, Buddhist or Sikh where such Wills are of the clauses specified in clause (a) & (b) of Section 57 of the Act. To say in other words, if the Will is falling in the category of the clauses other than Clause (a) & (b) of Section 57 of the Act, the restriction as provided in sub-section 1 of Section 213 of the Act shall not operate.

7. At this stage, it would be worthwhile to extract certain observations of the Apex Court in the case of **Clarence Pais and Ors. Vs. Union of India**, reported at **2001 SC 1151** wherein while considering the constitutional validity of the provisions of Section 213 vis-a-vis Section 57 of the Indian Succession Act at para 6, it has been observed by the Apex Court inter alia as under:

> *"A combined reading of Section 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Section 57(a) and (b), sub-section(2) of Section 213 of the Act applies and sub-section(1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories." (emphasis supplied.)*

8. The aforesaid position of law is settled by the highest Court of the country and therefore, no

further discussion may be required.

9. If the facts of the present case are considered in light of the above referred legal position, it cannot be disputed that the property is situated at Gandhinagar and is outside the territories of the original civil jurisdiction of the High Court of Bombay and the property is even otherwise is situated in Gujarat State, which is outside the original civil jurisdiction of the High Court of Bombay or Madras or Calcutta. Therefore, even without probate, the rights acquired by the executor or legatee of the Will can be established before the Court or before any other authority which in the present case is revenue authority.

10. Therefore, in view of the aforesaid legal position that for a Will executed by a Hindu qua the immovable property situated outside the territory of original civil jurisdiction of High Court of Bombay and Madras, the Probate is not compulsory for establishing the rights in the property as the property in the present case is situated in Gandhinagar, even without probate the legatee who is the petitioner in the present case can establish the rights pursuant to the Will executed by deceased Chandubhai Jivabhai Patel who is admittedly Hindu. Hence, the stand of the District Collector insisting the probate for the Will in question cannot be sustained in

the eye of law and deserves to be quashed and set aside.

11. In the result, the petition succeeds. The impugned communication made by the District Collector not to proceed with the mutation without their being any probate of the Will in question executed by the deceased Chandubhai Jivabhai Patel is quashed and set aside. Consequently, the District Collector shall be required to consider the matter for entering mutation based on the Will after following the procedure as may be required, if not followed, under Section Section 135 D of the Bombay Land Revenue Code and if the rights pursuant to the Will are established before him, the necessary mutation shall be recorded in the revenue record in favour of the petitioner as may be permissible in law.

12. Petition is allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, there shall be no order as to costs. D.S. permitted.

(JAYANT PATEL, J.)

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